



DATE: January 21, 1993

CASE NO.: 91-JSA-2

In the Matter of:

ANTONIO MORENO and  
RAMIRO GARCIA  
Complainant/Appellants  
v.

NAUMES, INC.  
Employer/Respondent

**APPEARANCES:**

Alcario Samudio and  
Elizabeth A. Crabb, Esq.  
For Complainant/Appellants

Pamela A. Mattson, Esq.  
For the State of Oregon

Annaliese Impink, Esq.  
For the Regional Administrator, ETA

BEFORE: ROBERT M. GLENNON  
Administrative Law Judge

**DECISION AND ORDER**

This matter involves two complaints filed pursuant to the provisions of the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. § 49, et seq., and the implementing regulations promulgated by the Department of Labor as found at 20 CFR Part 658. Pursuant to those regulations, Appellants here appeal the determination of the Regional Administrator, Employment and Training Administration, holding that no further action was warranted on their complaints. The Regional Administrator's decision affirmed the prior decisions of the State of Oregon's Employment Division dismissing the complaints. The procedural process for hearing and deciding complaints of this nature are published at 20 CFR §§ 658.417-658.425.

By a formal complaint filed on February 8, 1990, Antonio Moreno contends (1) that the respondent Employer, Naumes, Inc., did not honor material terms and conditions of the interstate

job clearance order for agricultural workers executed by that employer; and (2) that the housing furnished by that employer to Complainant did not meet the Federal standards mandated by 20 CFR § 653.501(d)(2)(xv). Administrative File, p. 259 ("AF 259") A companion complaint was filed by Ramiro Garcia on April 17, 1990, (1) asserting that the allegations against Naumes, Inc., in the Moreno complaint were correct, and (2) including the Texas Employment Commission ("TEC") as a respondent, alleging that its Harlingen Texas agent attempted to intimidate Garcia so that he would not pursue his complaint in this matter. AF 71, 74, 18 The regulations governing processing of complaints relating to the State/Federal job service system are stated at 20 CFR 658.400.

The Complainants had been recruited by an office of the Texas Employment Commission in Barlingen, Texas, for jobs harvesting pears at orchards of Naumes, Inc., in Medford, Oregon, in accordance with an interstate job service clearance order. That clearance order, job order No. 4105743, was issued on August 25, 1989 through the Oregon State Employment Division for recruiting 15 workers in the vicinity of Laredo, Texas, for work extending to October 1, 1989. AF 46 In recruiting workers under such clearance orders, state job service agencies function as a federally regulated, no-fee labor market, to facilitate bringing together widely separated agricultural employers and migrant farm workers. See 20 CFR Part 652

The State of Oregon job service agency conducted an investigation of the allegations stated in the Moreno and Garcia complaints, pursuant to the provisions of Section 658.416, and issued a determination on July 25, 1990, in the Moreno case, concluding (1) that there had been no violation by Employer of the terms and conditions of the job clearance order, and (2) that, if any housing violations had taken place, as alleged, they were of a minor nature and corrected promptly. AF176 An identical determination subsequently was issued in the Garcia case on September 20, 1990. AF-Garcia 27 In accordance with the provisions of Section 658.416(d)(5), complainants were given the opportunity to request a hearing before a State administrative hearing officer.

A formal on-the-record hearing on both complaints was conducted by means of telephone conference call on November 15, 1990 by a hearing officer of the Oregon Employment Division. The transcript of that hearing is contained in the Administrative File, at pages 116 through 165. Complainants were represented by Alcario Samudio, a legal assistant in the law offices of the Texas Rural Legal Aid, Inc., of Westlaco, Texas. Peter Naumes appeared in representation of his company. By a decision entered February 15, 1991, the Oregon hearing officer found that Antonio Moreno was entitled to no relief with respect to either of the issues specified in his formal complaint. By a separate decision issued on that date, the hearing officer dismissed the complaint of Ramiro Garcia on the ground that his failure to appear for the November 15, 1991 hearing meant he had abandoned his request for a hearing. AF 33-42

By a revised brief filed July 3, 1991, AF 13-115, Moreno and Garcia appealed the decisions of the Oregon hearing officer to the Regional Administrator, ETA, pursuant to 20 CFR § 658.418(c). The Regional Administrator issued a determination denying the appeals on July 26, 1991. AF 3 It is that determination of the Regional Administrator which Complainants have appealed to this office, pursuant to 20 CFR § 658.424.

By a Notice issued October 4, 1991, the parties to these proceedings were given the opportunity to submit any additional legal argument or documentation for consideration in this appeal, pursuant to the provisions of 20 CFR § 658.424 (b). Closing statements in response to that Notice were filed by the State of Oregon and by the Regional Administrator. I have concluded that the Complainants were given a fair hearing by the Oregon job service agency, and that these appeals should be decided on the existing administrative record.

1. The events giving rise to the complainants. Antonio Moreno, then a resident of Harlingen, Texas, visited the office of the Texas job service agency in Harlingen on September 6, 1989, looking for employment. He was then told of a seasonal job opportunity in Oregon, a job picking pears at the orchards of Naumes, Inc., a Medford, Oregon, fruit grower. Moreno had prior experience in agricultural harvesting work and decided to take the job. He was furnished a one-way bus ticket to Medford from Laredo, Texas, but had to get to Laredo from Harlingen on his own, which he did do, by bus.

Along with 4 other men from the area, Moreno traveled by bus from Laredo to Medford, leaving Laredo the afternoon of September 6th and arriving at Medford late at night on September 9th, somewhere between 10:30 p.m. and midnight. The men called the Naumes orchard at Medford, and a bus came to take them to Naumes's housing barracks. No food was given them that night, but they were given breakfast the next morning. Housing was provided for the men that night, but they found the conditions unsatisfactory, as discussed in more detail below.

Not only were the men put off by the housing facilities when they arrived at camp, they had been told by Naumes' bus driver on the way to the camp that they would be paid only \$5.50 per box of pears they picked, not the \$10.00 they were told about in Texas. In the morning when they discussed the job with the camp manager, they were told they had to see the boss, Peter Naumes, to clarify their wage earning situation. Moreno testified that they went to see Naumes that morning:

...because the man in charge there, the camp manager, [said] that we have to clarify the earnings - you know, how much you're going to earn. I say, well, how more clear do you want it. We have a contract here provided by the United States Department of Labor through - that the Texas Employment Commission agreed to with Pete Naumes, Inc. Hearing Transcript, p. 126

Moreno acted as interpreter at the meeting because the others spoke little or no English. Moreno, questioned about what Naumes told him at the meeting, said: "He wouldn't agree to the terms of the contract." Moreno testified that he said to Naumes that the contract called for \$10.00 per box and a guarantee of \$4.00 per hour for the first week of work. Moreno recalled that Naumes agreed to the \$4.00 guarantee, "He said he would pay us, I think, \$4.50 or \$5.50 per bin, minus the point system." Moreno asserted that if Naumes had agreed to pay the contract rate, \$10.00 per box, "we would have stayed there." TR 129

Q. And did - what did he - what did he do then, if he wouldn't honor your contract?

A. Well, we were like in a standoff. Either you're here, you take it or you go. They give us a ride back to the station - bus station in Medford. TR 128

Moreno and the others then pooled their money and took a bus to Redding, California, where they then went their separate ways. Without funds, it took Moreno about a week to hitch hike back to his home in Harlingen. He did not find any work along the way home.

Moreno testified that when the men first got to Naumes' housing facilities the night of September 9th, they were placed in a barracks that was dirty, with unsanitary conditions, with windows that lacked window panes, and no heat. The bed given him, he said, was a low army cot with a thin and dirty mattress. When he complained about the bed, he was told he could have a sleeping bag, but he would have to pay \$12.50 for it, to be deducted from his pay. Moreno declined to take the sleeping bag because he did not have any money and because, with a family to support at home, he did not want to incur this kind of deduction from his pay. TR 133 Moreno slept in his clothes, covering himself with a towel he had taken along. He believes that the barracks were overcrowded, with heavy drinking going on, inside and out. He recalled that the lights were not put out until about 4:00 in the morning. TR 135

In his March 21, 1990 statement responding to written questions from a State agency investigator concerning his complaint, Moreno said he had been told at the time of his recruitment that he would be given free round-trip transportation, as well as room and board at the Oregon labor camp. AF 84

A statement given by Ramiro Garcia on April 10, 1990 to the State investigator also shows that when he was recruited he also expected to be paid \$10.00 per box of fruit picked at the Naumes orchards. His statement is a typewritten transcription, translated from Spanish to English, of a telephone interview conducted by an Oregon staff member on April 10, 1990. AF 87 He too is a resident of Harlingen, Texas. He recalled being taken to the Naumes camp from Medford by a Spanish speaking driver who told them they would only get \$5.50 per box of fruit picked. He also said that the conditions at the barracks that night were not orderly, that there was mud and beer bottles on the floor, heavy drinking by the men there, a lot of drunk men, yelling and fighting. AF 88 He described the morning meeting with Peter Naumes as follows:

In the morning the five of us, Antonio Moreno, Jose Hernandez, Jose Chavez and Salvador Casanova and myself went to talk to the employer at his office. The supervisor of the camp gave us a ride, because he said that what the contract says and what TEC [the Texas job service agency] says is different and it would be up to the employer. When we got to the Office, the owner, an American man, did not pay very much attention to Antonio who showed him the contract. He appeared to be angry. He said who ever wants to stay can stay, the pay is \$5.50 a bin. He only said a few words then left. So we decided we would not stay and go across to California and try to find work there. AF 89

Peter Naumes testified at the November 15, 1990 hearing. He recalled his meeting with Moreno, Garcia and the three other men from Texas on September 10, 1989. The harvesting

season for his pear orchards had begun in mid-August and would end at about the first of October. Other workers from Texas had been arriving at the Medford orchards in early September, and it was Naumes' practice to meet new workers to register them and review documentation on eligibility to work. Naumes described his meeting With the five Texas workers, when they were taken by bus to his office that morning, as follows:

And when Moises [Naumes' bus driver] got out of the bus, he said something to the effect, these fellows don't want to work today - or don't want to work. I said, what's the problem? I don't know, but they really don't want to work. So they came down, and I said, do you want to register and we can work and here's what the rules are. And they - they really weren't interested in working, and I really didn't know why and it didn't make a lot of difference to us. If someone didn't want to work - they wanted to know where the bus station was. And I said, well, if you don't want to work - you don't want to stay - we'd like to have you stay, because we basically are paying by the hour for the initial part of the job. I said, we'll be happy to - they were getting ready to start walking back toward the bus station. I said, no problem, we'll drive you back to the bus station, if you - it's your -if it's your decision that you don't want to work. Transcript, p.24, AF 139

Naumes denied that he offered the Complainants wages lower provided in the job service clearance order. He testified:

. . . the question of paying five and a half a bin never came up. And I was shocked at that because we probably picked in excess of 30,000 bins and we didn't pick one single bin at \$5.50 a bin. Transcript, p.26, AF 141

Naumes testified that the housing facilities had been inspected officially for the State of Oregon in August 1989, prior to occupancy by the workers, and visited again by State and federal officials in September, and that no reports of broken windows were made. He said that no heating is provided in the barracks because the harvesting season ends around October first, prior to onset of cold weather. Sleeping bags were made available at the barracks at no charge if returned, and for a \$12.50 charge if not returned, to be deducted from the worker's pay. But Naumes testified that in fact no such charges were made. He stated:

Well, we never sold any, to be honest with you. What it was, was that we gave them the bag if they wanted a bag, and if they didn't return it, we were going to deduct the \$12.50. In practice, we didn't the \$12.50 either. Transcript, p.29, AF 144

Although the barracks were inspected as housing for 300 workers, only about 125 workers were housed there in early September 1989, according to Naumes' testimony.

2. The job service clearance order in issue. The August 25, 1989 job clearance order contains a number of attachments purporting to specify the applicable wage rates, including any special factors or deductions, the job specifications, housing and board arrangements, and

transportation arrangements, among other factors. AF 46 The clearance order contains the employer's certification that the order describes the actual terms and conditions of the employment. Attachment 9 to the August 25 clearance order describes the piece rate wages being offered, at least \$10.00 per bin, along with a description of the size of the bin and approximate weight of the pears it holds. It states that an hourly rate of \$4.00 will be paid for all non-picking work, along with an estimate that an average worker will earn between \$6.00 and \$8.00 per hour under average picking conditions.

The provision dealing with transportation arrangements, attachment 17 to the August 25 clearance order, states:

Workers recruited from beyond normal commuting distance will provide or pay for their own transportation and subsistence to the place of employment. AF 52

It further states that those workers who are unable to pay for their transportation to the place of employment:

. . . will be provided by the employer through the TEC with a non-refundable bus ticket at the time of departure to come to work for the employer. The employer will deduct the cost of this transportation from the workers paychecks in accordance with Item 9 of this Clearance Order... AF 52

3. Inspections by State and Federal Authorities. The worker housing facilities provided by Naumes at the Medford orchards were inspected for compliance with governing federal housing standards by a public health consulting firm for the Oregon Employment Division prior to the August 1989 occupancy. The inspection report, dated August 3, 1989, includes a completed checklist reflecting housing standards mandated at 20 CFR § 654, and shows compliance with those standards, with several minor exceptions. AF 55-65 The report notes that the buildings in the complex are well built and substantial, that they are served by public water and sewage, and that the mess kitchen was a large area that would be run by an operator of a local licensed restaurant. The inspector's checklist for these housing facilities shows a marking denoting as "not applicable" the provision of operable heating equipment. AF 56, 58

On September 19 and 20, 1989, compliance surveys of two Oregon orchards, including the Naumes orchard, was conducted by a staff member of the federal Employment and Training Administration, accompanied by two Oregon Employment Division staffers. AF 218-224 These surveys were conducted to verify that the housing, wages and other terms and conditions in the orchards complied with the clearance orders employed to recruit workers from Texas. A number of workers were interviewed and the housing facilities were inspected. The kitchen and eating facilities at the Medford camp were noted to be clean. Three housing deficiencies, categorized as "minor in nature," were found: a sink leaning off the wall in a bathroom; a first aid kit nearly empty; and missing fire extinguishers. The report noted that the Oregon State agency followed up and had the three deficiencies corrected. AF 220 No discrepancies with respect to payment of wages were reported.

Discussion and Conclusions. Initially, I conclude that the opportunity for a full and fair hearing process was provided to the Complainants at the State level, and that an additional evidentiary hearing at the federal level is not warranted. Administrative investigations were conducted by State of Oregon personnel and the results were provided to Complainants. Complainants had an ample opportunity to marshal their facts prior to the State trial. Following clear notices, the cases were given a formal on-the-record hearing before an impartial hearing officer, with the right to present witnesses and documentary evidence, cross-examine opposing witnesses, present argument, and appeal the written decisions flowing from that hearing process. Providing a second trial process would be duplicative and an inefficient use of governmental resources.

Upon review of the formal records in these proceedings, I conclude that the determination of the Regional Administrator in each of these proceedings, that Naumes, Inc., did not violate the terms of the clearance order or the governing housing regulations, should be affirmed. In addition, the allegation that an official of the Texas job service-agency attempted to intimidate Complainant Garcia has not been substantiated.

The evidence of record amply supports the specific findings of the Oregon hearing officer that Naumes, Inc., did comply with the terms of the August 25, 1989 clearance order in every respect material to the specific complaints of Moreno and Garcia. The housing facilities were officially inspected for compliance with the governing regulations both before occupancy and during occupancy and were found to be in substantial compliance on both occasions. The September 1989 field check by federal and State officials did not turn up any hint that Naumes was paying anything other than the wages specified in the clearance order.

Complainants only spent a few hours in the work camp, from very late the night of September 9th to very early in the morning of September 10th, and their impressions may have been affected by the confusion and frustration of the trying circumstances in which they found themselves. It seems apparent that they believed on their very long bus trip from Texas that they were going to get a much better deal than the deal that seemed to be evolving when they got to Medford, Oregon. Their conversation with Moises, the Spanish-speaking bus driver, en route to the camp appears to have confused and mislead them about the pay they would get per bin of pears they picked. But Moises was just a bus driver, with no standing as an official spokesman for Naumes. There is no indication that they discussed these wage levels with other migrant workers at the Naumes camp, but, in their short time at the camp, they apparently came to doubt they could possibly earn the \$6.00 to \$8.00 per hour estimated for "average" work on this job. They also apparently then came to realize, contrary to their prior expectations, that their \$89.00 bus fares from Texas would be deducted from their pay. Only Moreno spoke fluent English, and it is evident that the early morning meeting and discussion with Naumes, apparently done in English, was abrupt, confrontational, and disastrous for the five Texas workers. After a 3-day bus ride, these workers left camp with no jobs and little or no funds to get back home. Naumes lost workers for his harvest and nearly \$10.00 in bus fares he could have recovered from their earnings.

In retrospect, it seems that there surely must be a better way of telling or showing migrant workers, realistically, in their own language, the terms and conditions being offered in job

market situations like this. Perhaps certified video tape presentations by prospective employers should be required, showing the work, the housing conditions, and comparative rights and obligations of worker and employer. In this case, Complainant Moreno testified that he would have stayed there and worked if, in effect, he had been sure he would be paid \$20.00 per bin for his work at the Naumes orchards. He and the others should have been better prepared as part of their recruitment in Texas, and known clearly that they could have stayed in the camp and worked, and been paid at the \$10.00 level.

While it may have been insensitive, indifferent and arrogant of Peter Naumes, the person with greatly superior power in that situation on September 10, not to have taken more time to clear up the concerns and confusion of the five tired and upset Spanish-speaking migrant workers from Texas, the record does not show that he or his company violated any terms of the clearance order, or the governing regulations, in dealing with those workers. There is no hint of any evidence that Naumes paid any of the migrant workers in the camp any wages other than promised in the job order, and the Complainants' very short overnight stay in the barracks does not provide a sufficient factual basis for believing the housing facilities violated the regulations in any material or substantial respect. As found by the Oregon hearing officer, the circumstantial evidence supports Peter Naumes' testimony concerning the wages and conditions actually offered on September 10. To the extent they allege regulatory violations on the part of Naumes, Inc., the Moreno and Garcia complaints are identical. The Garcia complaint also alleges that he felt he was being intimidated by a Texas job service agent so that he would not pursue his complaint against Naumes. Complainant, however, has not seriously pursued that aspect of the complaint. Complainant was not in fact deterred from pursuing the complaint through his representative, Mr. Samudio. The allegation itself is not supported by factual evidence, nor any specific offer of proof presented subsequent to the date of the allegation, April 17, 1990. Neither at the time the Oregon hearing officer was considering dismissal of the Garcia complaint for failure to appear at the hearing, nor in the appeal of that dismissal, did Complainant offer to show factual evidence concerning anything other than the Naumes allegations. There had been ample time to prepare a case on the intimidation allegation prior to the November hearing. Moreover, I note that Mr. Samudio's in-court statement, AF 163, to the Oregon hearing officer that he had not received notice of the Garcia hearing date, November 15, 1990, is contradicted by his affidavit of July 2, 1991, AF 115, in which he states that he had received that notice and discussed it with Garcia's wife prior to November 14, 1990. It does not appear that any preparation was done to support the intimidation allegation in the Garcia complaint, and I conclude that it should be dismissed for lack of prosecution.

Complainants' memorandum in support of their appeal to the Regional Administrator, AF 14, additionally raises a number of issues and allegations not embraced within the scope of the substance of the formal complaints filed by Moreno and Garcia. For example, it is argued that the August 25, 1989 clearance order was blatantly discriminatory because it actually offered employment only to single males, since that order stated that housing was available only for "single workers," and since the pre-occupancy housing inspection report showed that the housing was "dorms for men only." The memorandum also alleges that the job service system failed "at all stages of this matter to protect the interests of migrant farmworkers." These contentions go well beyond the reasonable scope of the formal complaints in issue here, and are program and



policy matters that were addressed separately by the Regional Administrator of the federal Employment and Training Administration in correspondence to Mr. Samudio, as representative of Texas Rural Legal Aid, Inc. AF 3, 331-335

**ORDER**

It is ORDERED that the Determination of the Regional Administrator in each of these proceedings that the employer did not violate the governing regulations is AFFIRMED.

ROBERT M. GLENNON  
Administrative Law Judge